To be argued by
MILTON POLLACK, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 100.

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, suing on behalf of themselves and all other holders of Class B Debentures of GREEN BAY AND WESTERN RAILROAD COMPANY,

Petitioners,

—against—

GREEN BAY AND WESTERN RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

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OPINIONS BELOW.

The opinion of the District Court for the Southern District of New York (R. 37-40) is reported in 59 F. Supp. 98. The opinions of the Circuit Court of Appeals for the Second Circuit (R. 45-53) are reported in 147 F. (2d) 777.

GROUNDS OF JURISDICTION.

The judgment of the Circuit Court of Appeals for the Second Circuit (R. 56) affirming a judgment of the District Court for the Southern District of New York (R. 40) comes before this Court on a writ of certiorari granted October 8, 1945 (R. 57). The jurisdiction of this Court was invoked under Section 240[a] of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. Section 347[a]).

STATEMENT OF THE CASE.

Petitioners are residents of New York and the owners and holders of Class B debentures issued by the respondent, Green Bay and Western Railroad Company, a Wisconsin railroad corporation having an office and transacting business within the State of New York and the Southern District of New York.

Petitioners instituted this action in the Supreme Court of the State of New York, New York County, on behalf of themselves and all other holders of such Class B debentures, to recover moneys due and payable in lieu of interest on the debentures out of respondent's earnings (R. 1).

On petition of the respondent alleging diversity of citizenship, the action was removed to the United States District Court for the Southern District of New York (R. 1). Thereafter the respondent moved to dismiss the complaint for lack of jurisdiction over the person on the ground that it was not doing business in New York, and for lack of jurisdiction over the subject matter on the ground that the action was concerned with the internal affairs of a foreign corporation (R. 1).

The District Court found that the respondent was present and "doing business" within the State of New York and within the Southern District of New York, and accordingly it denied respondent's motion to dismiss for lack of jurisdiction over the person (R. 41). Respondent has taken no appeal from this determination.

The District Court nonetheless dismissed the complaint, without prejudice to the institution of a similar suit in Wisconsin, on the ground that "there is a lack of jurisdiction of the subject matter of the action in that the subject matter is concerned with the internal affairs of the defendant, a foreign corporation" (R. 41). The Circuit Court affirmed (R. 56), one Judge dissenting (R. 49).

There is no dispute as to the material facts. The debentures had their inception as valid obligations in the State of New York and within the territorial limits of the federal district court below (R. 8, 20-21). The debentures are listed and traded in as bonds on the New York Stock Exchange (R. 36). They are transferable on the books of the respondent only in New York (R. 8). All amounts due on these debentures in lieu of interest are expressly made payable in New York (R. 8), and such amounts as were in fact paid by respondent were admittedly paid from New York (R. 14). The respondent maintains its financial as well as a traffic office in New York (R. 14). It maintains a bank account in New York, not only for the purpose of meeting obligations of the very character which the petitioners seek to enforce, but also for its "excess of operating funds" not needed in Wisconsin (R. 14).

Five of respondent's six directors are to be found in New York and cannot be found for service of process in Wisconsin (R. 22, 28). These directors include all executive and fiscal officers excepting only the President, who is the sixth director and who supervises operation of the railroad from Wisconsin (R. 28). In New York are to be found two of the three members of respondent's Executive Committee, which is appointed from year to year and is authorized to act for the Board of Directors during intervals between meetings (R. 22, 29).

Directors' meetings are customarily held in New York City, and respondent—though relying successfully in the Courts below on the doctrine of *forum non conveniens*—admits that such meetings have been held in New York "for the convenience of Directors" (R. 15). Respondent's finan-

cial records, its transfer books, its minute books, its seal and other corporate records are all kept in New York (R. 13, 27).

Reports filed with the Securities and Exchange Commission by respondent are signed and sealed by the Secretary-Treasurer in New York (R. 27) and the New York office of the Treasurer is the place designated for delivery of notices from the Commission (R. 26, 35).

Finally, of the thirty largest stockholders of respondent owning an aggregate of 20,633 shares out of a total of 25,000 shares of stock outstanding, all but four have New York addresses according to reports filed by respondent with the Interstate Commerce Commission (R. 28).

The theory of the complaint (R. 2-6) is that the debentures issued by respondent (R. 6-8) constitute a contract between the company and debenture holders requiring the company to pay "in lieu of interest" certain designated amounts out of annual net earnings (R. 7), after deducting reserves set up by the company (R. 8), and that the liability to pay is not discretionary on the part of respondent or its board of directors (R. 5). Respondent concedes that "the single cause of action alleged in the complaint" proceeds on such a "construction of the provisions of the certificate of incorporation and the Class B Debentures of the defendant" as would require the respondent to pay the amounts claimed by petitioners "without exercise of discretion by the directors" (R. 11, 12). A specimen of the debentures is annexed to the complaint (R. 6).

Petitioners have not joined the directors as parties to this action because under their construction of the contract and under the theory of their complaint the directors lack all discretion as to the payment claimed and no relief is required as against them. The action taken by the directors in the past, setting aside out of annual earnings reserves for additions, general improvements and depreciation, is not disputed by the petitioners but is in fact adopted as a basis for their computation of the amounts now due (R. 8). It

is the free surplus remaining after such reserves have been deducted which petitioners claim under this contract (R. 9).

Specifically, petitioners allege in their complaint that, in each of the years 1924 to 1943 (excepting 1932, 1933 and 1934) respondent had substantial net earnings in excess of the $155,000. required in each of said years to satisfy preferential payments due to holders of respondent's capital stock and Class A debentures; that after additionally deducting amounts charged against earnings in each of such years for additions, general improvements and depreciation, the aggregate amount of such net earnings was $1,649,618.85 (R. 4), of which amount the sum of $809,618.85 representing free residual earnings was improperly withheld from the Class B debenture holders and accumulated in respondent's surplus account (R. 5). Judgment directing distribution of said sum pro rata among the Class B debenture holders is requested (R. 6).

Petitioners' position is that the language used in respondent's articles of incorporation (R. 3) and in the debentures (R. 6) grants to the Class B debenture holders an absolute and unqualified contractual right "to receive in lieu of interest thereon any net earnings of the railroad and property in each year remaining after payment of five per cent upon the said Class A Debentures and the said stock" (R. 3-4). As Judge Frank expressed it in his dissenting opinion in the Circuit Court, there is no "basis for any suggestion that the directors are given any discretion in fixing the amount to be paid" (R. 50).

SPECIFICATION OF ERRORS.

Errors intended to be urged are those specified in the petition for writ of certiorari under the heading "Questions Presented" (p. 5), the Circuit Court of Appeals having ruled adversely to the contentions of petitioners upon the questions there stated. Restated, the errors are:

1. The Court erred in holding that the cause of action set forth in the complaint in this suit involves interference with the "internal affairs" of a foreign corporation.

2. Assuming that such "internal affairs" are involved, the Court erred on the facts presented in declining jurisdiction of the suit in New York under the doctrine of *forum non conveniens*.

ARGUMENT.

POINT I.

THIS SUIT DOES NOT INVOLVE INTERFERENCE WITH THE "INTERNAL AFFAIRS" OF RESPONDENT.

The Courts below have declined to exercise an admitted jurisdiction because they were of opinion that this suit involves interference with the "internal affairs" of a foreign corporation within the doctrine of *forum non conveniens*.

The District Court apparently concluded that "internal affairs" were involved because, as it said, "the plaintiffs seek an interpretation of Wisconsin law, of the articles of incorporation and of the B debentures" (R. 39). It did not stop to construe the contract sued upon. It thought that the plaintiffs' construction "inevitably and necessarily involves the internal affairs of the defendant" (R. 39), though, as pointed out by Judge Frank in his dissenting opinion, "the contractual duty of the defendant depends solely on a mathematical computation easily made" (R. 52).

Obviously, the mere fact that Wisconsin law might be involved did not justify the rejection of jurisdiction. "The general rule is that one State will enforce a cause of action arising under the laws of another; that a federal court of any district will enforce a cause of action arising under the law of any State" (*James-Dickinson Farm Mortgage Co.* v. *Harry*, 273 U. S. 119; Mr. Justice Brandeis, at p. 125). The New York courts have not hesitated to construe the charters and obligations of foreign railroad corporations in similar situations. (Cf. *Thomas* v. *New York & Greenwood Lake Ry. Co.*, 139 N. Y. 163; *Boardman* v. *Lake Shore & Mich. So. Ry. Co.*, 84 N. Y. 157, 176; *Prouty* v. *Michigan S. & N. Indiana R.R. Co.*, 1 Hun (N. Y.) 655; see also N. Y. General Corp. Law, Sec. 224.)

Nor would the fact that the Wisconsin state courts had not passed upon the precise point be cause for declining jurisdiction. In *Meredith* v. *Winter Haven*, 320 U. S. 228, Chief Justice Stone said at page 237:

> "Erie R. Co. v. Tompkins, supra, did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern. Accepting this responsibility, as was its duty, this Court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain."

Unlike the District Court, the Circuit Court did construe the debentures. Differing, however, with the construction placed upon them in the complaint, the majority were of opinion that "before any sums became due and payable under the debentures, corporate action had to be taken to fix and determine them" (R. 48). But even they agreed that "jurisdiction ought not to have been declined" if petitioners' construction of the debentures was correct (R. 48).

The majority opinion in the Circuit Court fails to discuss the provisions in the articles of incorporation and the debentures upon which petitioners rely and which Judge Frank quoted in arriving at a contrary conclusion (R. 49). These provisions in the articles of incorporation state that the holders of B debentures are "to be entitled to receive in lieu of interest thereon any net earnings of the railroad and property in each year remaining after payment of five per cent upon the said Class A Debentures and the said stock" (R. 3-4), and the debentures themselves read:

> "Any surplus net earnings arising in such year which may then remain *shall* be paid to and distributed among the holders of Class B Debentures pro rata" (R. 7).*

*Italics supplied.

These debentures were first issued in 1896. While present day financing may run along different patterns, that surely is no reason for refusing to give effect to the plain language used by the respondent in placing these securities on the market. Similar language has frequently been construed to require mandatory payments of earnings involving no discretion on the part of directors, and the Courts have not hesitated to invoke well settled principles of contract law to permit a recovery in such cases.

Crocker v. *Waltham Watch Co.*, 315 Mass. 397, 53 N. E. 2d 230;
Wood v. *Lary*, 47 Hun 550, appeal dismissed 124 N. Y. 83, 26 N. E. 338;
Burk v. *Ottawa Gas & Electric Co.*, 87 Kans. 6, 123 P. 857;
Cratty v. *Peoria Law Library Assn.*, 219 Ill. 516, 76 N. E. 707.

In *Day* v. *Ogdensburgh & Lake Champlain R.R. Co.*, 107 N. Y. 129, a case in which a railroad corporation was sued by income bondholders to recover amounts which plaintiffs claimed had been improperly withheld from them, the New York Court of Appeals said at pages 141-142:

> "We are to consider the relation of the parties and their respective rights as defined by contract. So far as presented in this action they depend upon the true construction of the terms of the income bonds above referred to and part of which are held and owned by the plaintiffs * * * The plaintiffs' case is put and must stand, if at all, upon the terms of the bond and upon nothing else."

In *Thomas* v. *New York & Greenwood Lake Ry. Co.*, 139 N. Y. 163, *supra*, the same Court said at page 180:

> "In ascertaining the meaning of the contract, the same rules of construction apply as in other cases. The words are to be interpreted according to their natural and legal import."

The majority in the Circuit Court appear to have rested their construction of the debentures on the clause providing that the amounts payable "*will* be fixed and declared by the Board of Directors" (R. 7).* Obviously, the use of the simple declarative in this sentence does not lessen the preceding mandatory language. As pointed out by Judge Frank (R. 51), under such a provision a resolution by the directors is purely ministerial since the directors lack all discretion, and the obligation of the respondent to make payment of the amounts withheld is complete without any resolution. In the *Thomas* case, *supra*, the defendant argued that the plaintiffs could not recover because "it is by the contract a condition precedent to the right of the bondholders to maintain an action, that the board of directors should certify to the fact and the amount." Overruling this argument, the New York Court of Appeals said at page 182:

> "It would be a very unreasonable construction of the contract that the bondholders are concluded by the omission of the board of directors to certify, although there were earnings in excess of the fair charges against them, applicable to the payment of interest. The wrongful withholding of a certificate when demanded satisfies the condition precedent, and this is especially true where the alleged condition precedent is some act of the party who is liable to pay. In such case his wrongful inaction is no obstacle to a recovery."

Since the contract sued upon contains an absolute and unqualified obligation on the part of the respondent to pay the amounts claimed in this suit—the amounts are undisputed—it seems clear to us, as it did to Judge Frank, that there is no interference with the "internal affairs" of the respondent and hence that there is no room for any application of the doctrine of *forum non conveniens*.

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* Italics supplied.

POINT II.

ASSUMING ARGUENDO THAT THE DOCTRINE OF FORUM NON CONVENIENS HAS ANY APPLICATION, IT WAS AN ABUSE OF DISCRETION TO DECLINE JURISDICTION ON THE FACTS PRESENTED IN THIS CASE.

The District Court, being of opinion that the "internal affairs" of respondent were involved, concluded that jurisdiction should be declined on two grounds, which it stated as follows (R. 40):

> "(1) The defendant should not be put to the burden and expense of carrying on the litigation so far away as New York from its home State of Wisconsin.
>
> (2) When avoidable, the full calendars of this court should not be further crowded by adding another suit of substantial proportions (such as this obviously is) when there is open to the plaintiffs another forum, which is not only equally capable, but more accessible to the defendant."

The undisputed facts in this record are themselves the best answer to any claim that the respondent is being subjected to any undue burden by carrying on this litigation in New York. A place more convenient to the respondent than New York for the conduct of this litigation is hard to imagine. Wisconsin appears to be the place of least convenience. The notion that New York was more burdensome to the respondent than Wisconsin for the conduct of this litigation was wholly unrealistic. The fact that the petitioners were themselves residents of New York seems to have carried no weight.

Nor does it seem to us to be a proper application of the doctrine of *forum non conveniens* to decline jurisdiction because of the crowded calendars in the forum chosen by petitioners. We do not believe that the condition of the calendar is a consideration determining the acceptance or rejection of jurisdiction. We understand the term "conveni-

ence" when used in connection with the doctrine of *forum non conveniens* to refer to the convenience of litigants rather than to the convenience of the court. In *Meredith* v. *Winter Haven*, 320 U. S. 228, *supra*, Chief Justice Stone said, at page 234:

> "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience."

In the Circuit Court, the majority, proceeding on the assumption that the exercise of discretion by directors was involved, held that the District Court did not abuse its discretion in declining jurisdiction and remitting the parties to Wisconsin, where, said the Court, "both corporation and directors can be sued" (R. 49). Here again was a wholly unrealistic conclusion, for the assumption that the directors were amenable to process in Wisconsin appears to be contradicted by the record.

The undisputed facts in this record indicate that the directors are to be found for service of process in New York, where five of defendant's six directors reside or have their places of business and where directors' meetings are—*for the sake of their own convenience,* as respondent itself states—customarily and regularly held (R. 15). If, as the Court below has held, discretion is involved and corporate action by the directors is required, New York and not Wisconsin is the jurisdiction where the necessary parties are to be found. It seems manifest error then to invoke the doctrine of *forum non conveniens* to make it impossible for the petitioners to sue in the only district in which they can obtain jurisdiction over all necessary parties. Such a result moved Judge Frank in the Circuit Court to say that the doctrine applied here by the majority in that Court "might well be called '*forum inconveniens*'" (R. 52).

Both the District Court and the Circuit Court cited *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, in support of their rulings. But in the *Rogers* case it was emphasized, in both the majority and minority opinions, that considerations of

convenience and justice are paramount in the application of the doctrine of *forum non conveniens*. This Court there said:

> "* * * it safely may be said that jurisdiction will be declined whenever considerations of convenience, efficiency and justice point to the courts of the State of the domicile as appropriate tribunals for the determination of the particular case."

Although a very substantial interference with internal affairs was involved in the *Rogers* case, Justices Stone, Brandeis and Cardozo nevertheless dissented and were of opinion that on the facts presented jurisdiction should have been assumed.

The two remaining cases cited in the opinions below are readily distinguishable. In *Cohn* v. *Mishkoff Costello Co.*, 256 N. Y. 102, the relief requested was that the defendant be directed either to redeem its shares of stock at par value with accumulated interest or, in the alternative, that the defendant directors be compelled to declare a dividend out of surplus "at an equitable rate" and allegedly withheld in bad faith. Thus the case involved a very real interference with internal affairs; it would have required the exercise of the court's visitorial powers and raised problems of administration and enforcement. *Cohen* v. *American Window Glass Co.*, 126 F. (2d) 111, the other case cited by the Courts below, involved nullification of a foreign corporate charter and such other extensive relief that Circuit Judge Clark was moved to say that he could "hardly imagine a more complete interference with the internal affairs of a foreign corporation."

In the case at bar, no problem of administration is presented. The Court is not asked to exercise its visitorial powers over a foreign corporation; it is not asked to interfere with the directors' discretion; for it is petitioners' contention and the theory of their complaint that there is no discretion to be exercised. It is not an action in which a receiver is requested nor one in which changes in corporate

structure are sought as part of the relief. No reclassification or redemption of stock, or any similar far reaching relief, is sought.

There are no obstacles to the rendition of an effective decree. The federal court sitting in New York is in fact in a better position to enforce its decree than would be the branch of the federal court sitting in Wisconsin. The respondent is present in New York. With one exception, all of respondent's officers and directors are similarly to be found here. Its financial records are here. Funds for the purpose of meeting its obligations on these debentures are habitually kept here. What reasonable excuse then can there be for permitting the defendant to escape the jurisdiction of the federal court in New York? Surely not the doctrine of *forum non conveniens!* That doctrine, as Mr. Justice Cardozo pointed out in the *Rogers* case, is "an instrument of justice" (p. 151). "The rule is intended to promote justice and not to furnish an avenue of escape for those who should answer somewhere for the wrongs charged against them" (*Overfield* v. *Pennroad Corporation*, 113 F. (2d) 6, 10).

We submit that every consideration of convenience, efficiency and justice points to New York, the forum selected by the petitioners, as the only "appropriate forum" within the holding in the *Rogers* case.

This Court in *Meredith* v. *Winter Haven*, 320 U. S. 228, *supra*, indicated its concern with the failure of a federal district court to exercise its avowed diversity jurisdiction, in the absence of powerful considerations justifying non-exercise. We submit that the failure of the District Court to exercise its admitted jurisdiction in the case at bar was entirely unjustified.

POINT III.

NO QUESTIONS OF PUBLIC POLICY ARE INVOLVED UNDER PETITIONERS' CONSTRUCTION OF THE DEBENTURES.

In resisting petitioners' application for a writ of certiorari, respondent cited the case of *New York, etc. Railroad* v. *Nickals*, 119 U. S. 296, in support of the contention that petitioners' construction of the debentures would so impair the ability of the respondent railroad to maintain its road as to make the contract void as against public policy. The cited case is clearly distinguishable.

In the *Nickals* case, the plaintiffs, preferred stockholders, claimed that the application of net profits from operations towards providing additions and improvements to the railroad was "a violation of rights secured to preferred stockholders" under their contract (p. 302). The Court held that such expenditures were necessary and made "in good faith" (p. 303). Notwithstanding such a finding, the lower Court held that the preferred stockholders had an absolute right to receive annual dividends of 6% out of annual net earnings *before* deducting expenditures for improvements and additions. This interpretation of the contract was held by this Court to be "an erroneous interpretation of both the agreement and the company's charter" (p. 304). Buttressing its position, the Court went on to say that a different view would "lead to results which sound policy would seem to forbid" in that it would prevent the railroad from fulfilling its duty "to maintain its track and cars in such condition as to accommodate the public and provide for the safe transportation of passengers and freight" (p. 306).

Reference to Exhibit "B" attached to the complaint (R. 8) indicates clearly that no such problem is involved in the present case. Petitioners do not seek to avoid any expenditures or provisions made by the company for additions or improvements to the road. On the contrary, the right of the directors to exercise discretion in that respect and to charge

expenditures of this character against annual earnings is expressly recognized in Exhibit "B" attached to the complaint, for petitioners claim only such residual earnings as remain "after deducting reserves for additions, general improvements and depreciation" (P. 4, 8). Thus any claimed violation of public policy in the *Nickals* case, *supra*, simply cannot exist here.

In any event, the District Court for the Southern District of New York is as qualified to pass upon this point as is the District Court in Wisconsin.

CONCLUSION.

THE JUDGMENT BELOW SHOULD BE REVERSED, AND THE COMPLAINT REINSTATED.

Respectfully submitted,

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